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No. 88-939

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

RUSSELL LEON, as Personal Representative of the Estate of JORGE MORALES,

Petitioner,

vs.

JOAQUIN AVINO, as County Manager of Metropolitan Dade County, Florida, and RAYMUNDO BARRIOS, individually and as chairman of the Melrose Community Development Advisory Board,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on July 7, 1988 and reported as *Morales v. Stierheim*, 848 F.2d 1145 (11th Cir. 1988).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This action was filed by the Petitioner's decedent, Jorge Morales, against Merrett Stierheim and Raymundo Barrios in the United States District Court for the Southern District of Florida in November, 1985.[1]

Jorge Morales was employed by the Office of Community and Economic Development of Metropolitan Dade County, Florida ("OCED"). Morales was employed as principal planner for the Melrose Community Development Advisory Board, a group of citizen volunteers representing the Melrose neighborhood in Dade County, Florida (the "Melrose Board" or the "Board"). The Board's function is to determine the needs of the Melrose neighborhood, so that OCED can implement Dade County's federally funded community development plan for that neighborhood. Citizen participation is required for the use of these federal funds. The Melrose Board is not an agency of Metropolitan Dade County and has no control over OCED's personnel decisions. As a principal planner, Morales assisted the Board in identifying and

[1] Merrett Stierheim, the Dade County Manager at all times pertinent to this action, was sued in his official capacity. All claims against Stierheim individually were dismissed during the trial. Joaquin Avino succeeded Stierheim as Dade County Manager and was substituted as a party by order of the trial court.

prioritizing the needs of the neighborhood and in formulating plans for implementation of community development plans in the Melrose area. Morales was OCED's sole representative for the Board. Morales' role as principal planner required close work with the Chairman on agenda preparation, coordination of the Board meetings and the flow of information between the Melrose Community and the OCED. R.6-529. Raymundo Barrios is an elected member of the Melrose Board and was appointed as Chairman of the Board by his fellow members.

On October 25, 1985, OCED reassigned Morales from his position of principal planner to Melrose to principal planner for another neighborhood. This reassignment involved no loss of salary, job benefits or responsibility. Dr. Ernest Martin, Morales' supervisor, testified that he made the reassignment because the continuing disruptions and conflicts between Morales and Barrios impeded the community development process in Melrose. R.6-499. At trial Morales confirmed that his conflicts with Barrios interfered with the community development process in Melrose. R.6-494.

During one such conflict on June 25, 1985, Morales publicly called Barrios a "saboteur", "hypocrite" and "Machiavellian politician". Dr. Martin met with Barrios and Morales after this incident. Both agreed to try to cooperate.

On September 17, 1985 at a public meeting of the Board, Morales called Board members "liars" and "distorters of the truth" during a discussion of the reasons

behind the delay in the start-up of a community-requested garbage clean-up campaign. R.7-605.

Barrios and Melrose Board Secretary, Mario Delgado, disturbed by the occurrence at the September 17th meeting met and prepared a petition for signature by the other Board members. Twelve of the thirteen Board members and one member of the Melrose community met and signed the petition, because they felt something had to be done to maintain contact between the Board and OCED. R.4-160. The petition requested Morales' reassignment based on his "improper words and disrespectful statements" and the Board's inability to communicate with him.

In a memorandum dated October 2, 1985, Morales responded to the Board's petition by stating *inter alia* "I believe we all know how Mr. Barrios uses his disruptive tactics and how he lies and distorts the facts." R.1-4-16. Morales also alleged that Barrios had in the past sought "kickbacks" and campaign contributions from him. R.1-4-16. Morales reported his allegations of Barrios' alleged malfeasance to the Dade County State Attorney's Office, which did not initiate a criminal investigation. R.6-539. Barrios was unaware Morales had accused him of corruption until the trial of this matter.

Morales filed suit in the United States District Court for the Southern District of Florida claiming that his reassignment from the Melrose Board violated his first amendment rights. The case was tried to a jury, and the trial court entered a final judgment based on the jury verdict awarding Morales $20,000 in compensatory damages against Barrios and OCED and $5,000 in punitive

damages against Barrios. The court also permanently enjoined OCED from reassigning Morales in violation of his first amendment rights. The trial court awarded Morales attorney fees of $49,687.50 pursuant to 42 U.S.C. § 1988. The court stayed the final judgment for damages and permanent injunctive relief pending the outcome of the Defendants' appeal to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit Court of Appeals reversed the judgment of the trial court and award of attorney fees and ordered judgment entered in favor of OCED and Barrios. The Eleventh Circuit found that Morales' speech addressed issues of public concern and upheld the jury's finding that the statements at issue were a substantial motivating factor in Morales' reassignment. 848 F.2d 1145, 1148 n.2. The appeals court reversed the trial court's judgment, however, because its application of the *Pickering* balancing factors indicated by a substantial margin that OCED's interest in efficient government administration outweighed Morales' interest in making the statements at issue. *Id.* at 1148 n.4. Morales filed a motion for rehearing which was denied on September 6, 1988. On December 5, 1988 the Petitioner filed his petition for writ of certiorari with this Court.

SUMMARY OF ARGUMENT

Reasons For Denying Certiorari

According to the opinion of this Court in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d

811 (1968) and *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), it is not a violation of the first amendment for the government to reassign its employee, Jorge Morales, in the interest of efficient operation of government activity, after the employee verbally attacks a person with whom he is required to work closely.

The Eleventh Circuit's independent review of the evidence in this case to determine if the first amendment was violated is not a violation of the seventh amendment right to jury trial, when no jury findings were reexamined. The Eleventh Circuit reversed the court below on an issue of law. Even if jury findings were reexamined in making that determination, the Eleventh Circuit's review did not violate the seventh amendment. *Bose Corporation v. Consumers Union of U.S. Inc.*, 466 U.S. 485, 80 L.Ed.2d 502, 104 S.Ct. 1949 (1984).

ARGUMENT

I

In holding for OCED and Barrios, the Eleventh Circuit correctly balanced the government's interest in the efficiency of its programs against Morales' right as a government employee to verbally attack Barrios. A simple analysis of the opinion below shows that the Eleventh Circuit reviewed only the issues of whether Morales' statements touched a matter of public concern and whether such speech is protected under the first amendment. Both are questions of law, not fact. *Connick v. Myers*, 461 U.S. 138, 148 n.7, 103 S.Ct. 1684, 1690 n.7, 75 L.Ed.2d 708, 720 n.7. The question of whether the conduct

or speech at issue is constitutionally protected is a determination which must be made by examining the "content, form, and context of a given statement as revealed by the whole record." 103 S.Ct. at 1960.

As a preliminary step in analyzing a public employee's first amendment claim, the court must determine whether the employee's statement may be "fairly characterized as . . . speech on a matter of public concern." *Id.* at 461 U.S. 138, 143, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708, 713. Even where public employees are engaged in speech on a matter of public concern, their interest in engaging in such speech must be balanced against the public employer's undeniable, legitimate interests in promoting or maintaining efficiency in government administration. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). The *Pickering* court described the balancing test as follows:

> In performing the balancing, the statement will not be considered in a vacuum; the manner, time and place of the employee's expression are relevant, as is the context in which the dispute arose. We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.

Id. at 568.

In the present case, the Eleventh Circuit correctly applied the *Pickering* factors to the facts of this case as found by the trial court. Mora es' statements seriously

impeded the community development process in Melrose, according to the testimony of OCED's Director Dr. Ernest Martin. 848 F.2d 1145, 1150 (11th Cir. 1988). Although Morales was OCED's liaison to the Melrose community and was required to consult with the Chairman to determine the agenda for the neighborhood meetings, he could no longer communicate with the Chairman and the members of the Melrose board. Morales also testified that his problems with Barrios interfered with the community development process. R.6-468. Because of the continuing disruption in relations between Morales and the Board and to keep the community in contact with the County, twelve of thirteen Melrose Board members and one member of the Melrose community met and signed a petition requesting Morales' reassignment as a result of his statements before the board R.4-160.

It is important to note in analyzing the time, place and manner of the speech at issue here that Morales called Barrios a "saboteur", a "hypocrite", and a "Machiavellian politician", a "distorter of the truth" and a "liar" in a public meeting. Such personal, intemperate remarks could only serve to further alienate Barrios and totally destroy the necessarily close working relationship between Barrios and Morales.

There is no basis for Petitioner's argument that Barrios infringed Morales' constitutionally protected rights by seeking his reassignment following Morales' statements in the public meeting of September 17, 1985. Nothing in the Constitution strips Barrios of the right as a citizen to complain about misconduct and insulting remarks from a public employee. *See Egger v. Phillips*, 710 F.2d 292 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 284 (1983).

Reproach from those against whom one inveighs is a natural cost of an intemperate verbal attack. *See Id.* at 322-23.

II.

Petitioner argues the Eleventh Circuit rejected the findings of the jury in violation of the Seventh Amendment to the United States Constitution in performing the *Pickering* balancing test and concluding that OCED's interest in efficient administration of its programs outweighed Morales' first amendment rights. Although the petition is not specific as to the facts allegedly rejected, it seems to indicate that by reversing the award of punitive damages, the Eleventh Circuit found Morales more blameworthy than Barrios for causing the verbal melee during which Morales made the statements at issue. Pet. 6-7. The petition also suggests that in holding the *Pickering* balance weighed heavily in the government's favor, the Eleventh Circuit reversed a nonexistent jury finding that the actual reason for Morales' reassignment was Barrios' alleged threat that "Morales should start looking for a new job".

Soundly established federal constitutional law holds that appellate courts must exercise independent constitutional judgment on the facts of the first amendment case under review. *Connick v. Myers,* 103 S.Ct. 1684, 1691 n.10. First amendment cases address such important rights that *de novo* review is compelled. *Bose Corporation v. Consumers Union of U.S. Inc.,* 466 U.S. 485, 508 n.27, 80 L.Ed.2d

502, 522 n.27, 104 S.Ct. 949, 972 n.27 (1984).[2] Reexamination of facts tried to a jury does not violate the Seventh Amendment "where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts. *Bose* quoting *Fiske v. Kansas*, 274 U.S. at 385-386, 71 L.Ed. 1108, 47 S.Ct. 655 (1927). In *Bose*, this Court reversed a trial court's finding that a magazine publisher had defamed a public official with "actual malice", when the author of an article in the magazine wrote an inaccurate description of what he had perceived and insisted that he was not mistaken in his statement. *Id.* at 524.

Whether the Eleventh Circuit could have reversed the jury's findings in this case is an academic issue. No jury findings were reversed. The jury did not find that Morales was transferred because of Barrios' alleged threats. Assuming arguendo that Barrios threatened Morales, there is no evidence that Morales' reassignment resulted from that threat. To the contrary, the evidence

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[2] Petitioner incorrectly claims that *Bose* does not require a *de novo* review of the evidence in the exercise of its independent constitutional judgment. Pet. 7. The portion of *Bose* on which the Petitioner relies merely establishes that the reviewing court in *Bose* did not need to review the entire record to determine, if the defendant magazine publisher acted with malice in publishing a review of Plaintiff's speakers. *Bose*, 466 U.S. 485, 514 n.21b. Only facts pertinent to the "malice" issue should be accorded *de novo* review. Any review of facts in the record which were irrelevant to the issue of "malice" must be performed in accordance with Fed.R.Civ.P. 52(a) which accords facts found by a jury with deference, such that these facts can only be overturned when they are clearly erroneous. *Id.*

supports the Eleventh Circuit's holding that the close working relationship between Barrios and Morales had been destroyed to the detriment of the community development program. *Id.* at 1150.

In reversing the award of punitive damages, the Eleventh Circuit blamed neither Morales nor Barrios for causing the hostile atmosphere in which Morales' vituperative remarks were uttered. The court's opinion merely states the obvious: no damages, either compensatory or punitive, can be awarded upon a finding that no first amendment violation occurred. Petitioner's insistence on inserting the irrelevant issue of fault is an injudicious use of this Court's time and an attempt to make a "federal case" out of a personnel problem. *See Bishop v. Woods*, 426 U.S. 341, 350, 96 S.Ct. 2074, 2080, 48 L.Ed.2d 684, 693 (1976). The Eleventh Circuit reached no factual conclusions contrary to those of the jury. The court assumed the truthfulness of Morales' version of the facts, but reached a different legal conclusion than the trial court. However, even if contrary factual findings were made by the reviewing court, *Bose* allows the reexamination of these facts when relevant to the determination of first amendment issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

In reproducing *Morales v. Stierheim*, 848 F.2d 1145 (11th Cir. 1988), which is attached to the Petition for Writ of Certiorari as Appendix A, Petitioner omitted portions of the first paragraph of the "Discussion" section. The entire paragraph is reproduced below with the omitted portions underscored:

II. DISCUSSION

[1] Morales argues that OCED reassigned him for engaging in constitutionally protected speech, in violation of his right to freedom of speech under the First Amendment. It is well settled that "a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson*, ___ U.S. ___, 107 S.Ct. 2891, 2896, 97 L.Ed.2d 315 (1987); *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). In order to prevail on his claim, Morales must show that his statements addressed a matter of public concern.[2] If the speech does not touch upon a matter of public concern, then the court may not ordinarily scrutinize OCED's decision to reassign Morales. *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708 (1983); *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir.1986). If the speech at issue does involve a matter of public concern, then the *Pickering*[3] balancing process is triggered. The determination of whether a public employer had properly discharged an employee for engaging in speech requires a balance between the interests of the employee as a citizen in commenting upon matters of public concern and the

interest of the state, as employer, in promoting the efficiency of the public services it performs. *Rankin v. McPherson*, ___ U.S. ___, 107 S.Ct. 2891, 2896, 97 L.Ed.2d 315 (1987); *Connick v. Myers*, 461 U.S. 138, 149-54, 103 S.Ct. 1684, 1691-94, 75 L.Ed.2d 708 (1983); *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir.1986). We first address whether Morales' speech addressed a matter of public concern, and then turn to the *Pickering* balancing process.[4] Both issues are questions of law with respect to which the court is required to examine for itself the statements at issue and the circumstances under which they are made to determine whether or not there is First Amendment protection. *Rankin v. McPherson, supra; Connick v. Myers*, 461 U.S. at 148 n. 7, 150 n. 10, 103 S.Ct. at 1690 n. 7, 1692 n. 10.

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[2] Of course, in order to prevail Morales must also show that his statements were a substantial motivating factor in his reassignment. *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir.1986). In this case, the jury found that Morales' statements were a motivating factor in his reassignment, and also that he would not have been reassigned in the absence of such statements. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). The causation issue is a factual one, *Waters v. Chaffin*, 684 F.2d 833, 837 n. 10 (11th Cir.1982), and these jury findings are amply supported by the evidence. Thus, in the text, we discuss only two issues – whether the speech addressed a matter of public concern, and if it did, whether the *Pickering* balance tilts in favor of Morales' speech interest or OCED's interest in the orderly administration of its governmental office.

[3] *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

[4] The law is clear that Morales bears the burden of proving that his speech addresses a matter of public concern.

Ferrara, 781 F.2d at 1514. If that burden is carried, it is also clear that in the balancing process the governmental employer bears the burden of justifying the discharge. *Rankin,* ___ U.S. at ___, 107 S.Ct. at 2898. In this case, our resolution of each of the two issues is indicated by a substantial margin, and thus the burden of proof does not affect our decision.